Supreme Court, U.S.
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No. 95-1512

In The

Supreme Court of the United States

October Term, 1995

MICHAEL TOTEMOFF,

Petitioner,

v.

STATE OF ALASKA,

Respondent.

On Petition for a Writ of Certiorari To The Alaska Supreme Court

PETITIONER'S REPLY MEMORANDUM

JOHN B. SALEMI
Public Defender
State of Alaska

PAUL E. MALIN
Assistant Public Defender
Counsel of Record for Petitioner

Public Defender Agency
900 W. 5th Avenue, Ste. 200
Anchorage, Alaska 99501
(907) 264-4400

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I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE NINTH CIRCUIT AND THE ALASKA SUPREME COURT HAVE DIRECTLY CONFLICTING DECISIONS ON ANILCA'S PREEMPTIVE SCOPE THAT CAN ONLY BE RESOLVED BY THIS COURT

A. Introduction and Overview

For the thousands of Alaskans who live in remote rural villages and other rural areas, ANILCA provides a rural subsistence priority that protects their customary hunting practices and subsistence uses on federal land and waters. The Alaska Supreme Court has struck down the rural subsistence priority, rejected protection for customary hunting practices, and repudiated federal jurisdiction over both federal land and waters. The breakdown of the program of "cooperative federalism" established by Congress in Title VIII of ANILCA could not be more complete. The State's assertion that there is no conflict between state and federal law is, therefore, nothing short of incredible.

B. The State Ignores ANILCA's Plain Language

In arguing that there is no conflict between the Alaska Supreme Court and federal courts over ANILCA's

preemptive scope, the State contends that Mr. Totemoff has incorrectly assumed that "title VIII mandates a state enforcement program or the federal agencies will adopt one." Opp. 4. But the plain language of title VIII offers Alaska the choice between "federal regulation or self-regulation with federal oversight." Kenaitze Indian Tribe v. Alaska, 860 F.2d 312, 314 (9th Cir. 1988), cert. denied, 491 U.S. 905 (1989). The State does not even mention Kenaitze.

The State asserts that "[n]othing in ANILCA limits the state's authority to enforce state laws that do not encroach upon a rural resident's subsistence priority." Opp. 4-5. The State concedes that "the federal agencies will promulgate regulations to assure the [rural subsistence] priority" and that "means and methods" regulations are necessary to assuring that priority. Opp. 4. The State's argument fails on its own terms: if federal means regulations are necessary to implement the priority, state enforcement of its regulations necessarily "encroaches" upon that priority.

That argument aside, under the State's theory of jurisdiction, the State of Alaska and the United States will each separately enforce their essentially identical regulations.

The State of Alaska would retain, under this theory, the same jurisdiction it had when the Alaska legislature had enacted "superseding" state law that met ANILCA's requirements for supplanting the federal regulatory scheme. ANILCA § 805(a),(d), 16 U.S.C. 3115(a),(d) (Pet. App. 63).

Two results are possible under the State's theory of jurisdiction. First, the Secretaries of Agriculture and Interior would have no regulatory program to manage because the State of Alaska would enforce all non-conflicting state laws. Alternatively, the respective sovereigns would simultaneously implement and enforce the same regulatory program. Both results are foreclosed by ANILCA's plain language, federal caselaw, the federal government's express withdrawal of Alaska's certification to manage subsistence uses in 1990, and common sense. Given the State of Alaska's failure to provide a "superseding" rural resident subsistence priority, its "responsibility and authority" is expressly "diminished" to the extent that it has no direct enforcement role. 16 U.S.C. § 3202(a)(b); Section 805(a), 16 U.S.C. § 3115(a)(d) (Pet. App. 61-61,70). See State of Alaska v. Babbitt, 72 F.3d 698, 700-01 (9th Cir. 1995), cert. denied, __U.S.__ (1996) (describing how, in 1990, Alaska's failure to provide ANILCA's rural

subsistence priority resulted in "the federal government withdraw[ing] Alaska's certification [to manage subsistence hunting and fishing on public lands] and [taking] over implementation of Title VIII" by publishing temporary and final subsistence management regulations).

Without citing the statute, or any authority whatsoever, the State asserts that "Title VIII does not mandate any particular implementation program." Opp. 4. That argument completely ignores the plain language of section 805(a), which mandates that "the Secretary ... shall establish ... subsistence resource regions...[,] a regional advisory council in each subsistence region...[, and] such local advisory committees as he finds necessary." 16 U.S.C. § 3115(a)(1)-(3) (Pet. App. 61) (emphasis added). Under section 814, "the Secretary shall prescribe such regulations as are necessary and appropriate to carry out his responsibilities under this title [VIII]". 16 U.S.C. § 3124 (Pet. App. 69) (emphasis added). Under section 805, each advisory council is charged with reviewing and evaluating proposed "regulations, policies, and management plans." 16 U.S.C. § 3115(a)(3)(A) (Pet. App. 61). However, "[t]he Secretary shall not implement" this federal subsistence program "if ...

the State enacts and implements laws of general applicability which are consistent with, and which provide for, the definition, preference, and participation specified in sections 803, 804, and 805, such laws, unless and until repealed, shall supersede such sections insofar as such sections govern State responsibility..." 16 U.S.C. § 3115(d) (Pet. App. 63) (emphasis added). Title VIII, therefore, unequivocably mandates a particular implementation program whereby direct management by the Secretaries could be withheld upon provision of conforming state laws. Indeed, subsection (d) is entitled "Supersedure by enactment and implementation of State laws governing State responsibility." Id. (emphasis added). This is ANILCA's "clear statement."

The State's argument is premised entirely on federal regulations that permit state officers to investigate violations of federal subsistence regulations. Opp. 6. This limited role, however, does not transform exclusive federal jurisdiction into fully concurrent state jurisdiction. While a state officer who is cooperating with the federal regulatory program may ask a federal rural subsistence hunter for proof of license or inspect gear, jurisdiction for any violation properly lies in federal court.

The State's reliance on administrative interpretations is similarly misplaced. Administrative interpretation of a statute contrary to its plain language deserves no deference. Demarest v. Manspeaker, 498 U.S. 184, 190 (1991). Moreover, any temporary federal subsistence regulation must be viewed in the context of the Secretary's expectation that the Alaska legislature would quickly return Alaska to compliance. See 55 Fed. Reg. 27,114-15 (June 29, 1990). Finally, it is the interpretation of the United States Subsistence Management Division that federal law applies on federal land that deserves deference. See Pet. 8, n.4.

II. A FEDERAL SUBSISTENCE HUNTER SHOULD NOT HAVE TO FACE STATE CRIMINAL CONVICTION AND INCARCERATION WHEN HE HAS BEEN PRECLUDED BY STATE LAW FROM RAISING A FEDERAL DEFENSE

In Totemoff, the Alaska Supreme Court analyzed Native Village of Quinhagak v. United States, 35 F.3d 388 (9th Cir. 1994), and concluded that, based on that case, "ANILCA does protect customary and traditional means and methods." (Pet. App. 12). Relying on Quinhagak, the court in Alaska Wilderness and Tourism Ass'n v. Morrison, 67 F.3d

723, 731 (9th Cir. 1995) concluded that "[s]ubsistence needs are not limited to maintaining a sufficient food supply, but include customary and traditional practices which ANILCA was designed to protect." Therefore, under federal law, ANILCA's protections extend beyond mere "use". The State now asserts that there is no conflict between state and federal courts. The State is incorrect.

Section 804, 16 U.S.C. § 3114 provides, in relevant part, that "the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes." (Pet. App. 60) (emphasis added). Section 102, 16 U.S.C. § 3120 defines "taking" as the "means to pursue, hunt, shoot, trap, net, capture, collect, kill, harm, or attempt to engage in any such conduct." (Pet. App. 57) (emphasis added). Changes in technology or techniques by those engaged in subsistence uses do not place those users "outside the scope of this act [ANILCA]." H.R. Rep. No. 95-1045, Part I, 95th Cong.; 2d Sess. 186 (1978).

The recent analysis of State v. Morry, 836 P.2d 358 (Alaska 1992) by the Joint Federal-State Commission on

Policies and Programs Affecting Alaska Natives supports the conclusion that federal law protects customary and traditional hunting practices. Morry relied on federal law under ANILCA to argue that "state regulations must broadly protect the customary and traditional character of subsistence hunting and fishing." Final Report, Joint Federal-State Commission on Policies and Programs Affecting Alaska Natives (vol. III at 35, May 1994). The Alaska Supreme Court rejected that argument, holding that under state law, "customary and traditional" refers only to post-harvest subsistence uses, not the methods and means of harvest themselves. State v. Morry, 836 P.2d at 369-70. The Commission described Morry as "an example of how the gap between federal and state subsistence regulations has been steadily widening since McDowell." Final Report, supra, at 35. The Commission concluded that:

> What Morry shows is that, although subsistence advocates had labored to achieve a judicial interpretation of state regulations that used the concepts and standards of federal law, the effort had not succeeded. State court constructions of state subsistence statutes are now irreconcilably different from federal court interpretations of ANILCA... the whole structure of state law, regulation and judicial interpretation has been moving away from federal law for years... the underlying clash of

> legal ideologies is probably permanent and irreconcilable. Hence, the even greater need, from the viewpoint of subsistence interests, for federal oversight and intervention.

Final Report, supra, at 35-36.

Finally, the State argues that a federal rural subsistence hunter such as Petitioner Totemoff charged in state court has received all federal defenses because he "could defend by claiming ... ANILCA preempt[ion]." Opp. 7,10. This claim is disingenuous. A criminal defendant can always defend on the ground that the court does not have jurisdiction; such a defense is never waived or forfeited. The right to raise a lack of jurisdiction does not cure the "irreconcilable differences" between state and federal law. See Pet. App. 24-25 n. 12.[1]

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[1] The State's statement of the case suggests, without expressly asserting, that Mr. Totemoff's use of a "big fishing boat" in the winter, and the total number of deer in the boats, were improper. Opp. 1. This suggestion in incorrect. Tatitlek Village hunters customarily "took a commercialfishing boat [and] went further [than nearby deer hunting sites] to larger islands in the sound and stayed out longer. Much of the deer hunting involved hunting along the coastline for deer near the water's edge.... Much of the hunting occurred in the winter, after commercial fishing season." Lee Stratton, Resource Harvest and Use in Tatitlek, Alaska, Alaska Dpartment of

CONCLUSION

For the reasons set forth in the petition, and those described here, this Court should grant the Petition for Writ of Certiorari. Alternatively, this Court should summarily reverse the decision below.

DATED: May 13, 1996

Respectfully submitted,

Paul E. Malin
Assistant Public Defender
State of Alaska

Fish and Game Technical Paper No. 181 at 113-15. Furthermore, Mr. Totemoff complied with all other applicable laws, including bag and possession limits. As the trial court stated, Mr. Totemoff "had the proper license and tags and it's only a question of the method of taking." (Pet. App. 72)